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No. 89-857

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

W.B. SAUNDERS COMPANY AND CBS EDUCATIONAL AND PROFESSIONAL PUBLISHING, a Division of CBS Inc.,

Petitioners,

v.

ADELINE M. BRUNO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, MERCHANTS AND MANUFACTURERS ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF MERCHANTS AND MANUFACTURERS ASSOCIATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Merchants and Manufacturers Association (the "Association") moves the Court for leave to file the attached brief of amicus curiae in support of the Petition for Writ of Certiorari. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondents was requested but refused.

I.

NATURE OF THE INTEREST OF THE ASSOCIATION.

The Association is a non-profit California corporation. Its purpose is to augment the human resources management of member firms. Over 3,700 companies of varying sizes and industries are members of the Association. The members collectively employ over one million employees.

The general purposes of the Association are, in part, to promote a healthy business and economic environment, to foster meaningful programs for its employer members, and to advance the civic, commercial, and industrial interests of its members. The Association provides consulting and educational services to its membership in connection with personnel and employment relations matters, including employment litigation. From time to time, the Association is asked by its members to provide consulting services and assistance in connection with their compliance with federal and state age discrimination laws.

II.

ISSUES TO BE ADDRESSED BY THE ASSOCIATION.

Because of the aging of the United States population in general, and the workforces of its members in particular, the Association and its members are extremely concerned about the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), and the impact of the ADEA and judicial interpretations of the ADEA on the business decisions of employers. Litigation under the ADEA has exploded in recent years and affects, directly or indirectly, practically all employers in the United States. According to recent statistical data from the General Counsel's Office of the Equal Employment Opportunity Commission ("EEOC"), between 1983 and 1988, an average of almost 13,000 ADEA charges were filed each year with the EEOC. Between 1985 and 1988, an

average of 95 federal ADEA lawsuits were commenced each year. Preliminary figures for 1989 show 133 new ADEA lawsuits have been commenced, a record high.

The Association's interest in this Petition concerns the far-reaching and potentially devastating impact of one such judicial interpretation of the ADEA on its members. The Third Circuit's opinion is the most troubling decision under the ADEA in recent years. The court below upheld a jury verdict based solely on the difference in the ages of comparable employees and evidence which merely questioned the employer's nondiscriminatory explanation for selecting another employee not in the protected class. The court below also admitted into evidence statistical comparisons of the ages of the employer's workforce which failed to account for the minimum objective qualifications of the job positions studied. In addition, the court below found that an employee's refusal of an unconditional job offer of substantially equivalent employment was insufficient to toll an employer's backpay liability.

If left standing, the decision of the court below will endorse findings of age discrimination under the ADEA where there is no evidence that the challenged employment decision was in fact motivated by an intent to discriminate. In effect, the decision of the court below leaves employers exposed to judicial second-guessing of their business judgment and permits a finding of an ADEA violation if a jury concludes that the employer's business judgment may have been mistaken. The opinion of the Third Circuit also threatens employers with the unbridled use of meaningless, highly prejudicial statistical comparisons in individual disparate treatment cases, even though such "evidence" is barred as a matter of law in class action disparate impact and disparate treatment cases under the ADEA. Finally, the Third Circuit's opinion is a ringing endorsement for employment discrimination plaintiffs to reject unconditional offers of substantially equivalent employment.

The Association's brief examines the widespread conflict among the federal circuit courts of appeals in ADEA cases,

the failure of the court below to adhere to this Court's authority, and the significant impact of the decision on employers.

The Association submits that its experience in employment-related matters, its large employer-group membership, and its amicus curiae appearances in other forums, gives it the ability to focus on the long-term impact of the decision below on the Association's members as well as all employers in the United States. The Association is in a unique position to develop more fully the consequences of the lower court's decision on large and small employers alike.

For the foregoing reasons, the Court should grant this Motion for Leave to File Brief of Amicus Curiae in Support of Petition for Writ of Certiorari.

Dated: December 28, 1989.

Respectfully submitted,

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DESCRIPTION OF INTEREST OF AMICUS CURIAE

The Merchants and Manufacturers Association (the "Association") adopts the statement made in the Motion for Leave to File Brief, immediately preceding this brief, as the description of the interest of amicus curiae.

CONSENT OF PARTIES

Respondent to this action refused consent to the filing of this brief by the Association. The petitioners have consented to the filing of this brief and such written consent will be filed concurrently.

STATEMENT OF THE CASE

The Association adopts the Statement of the Case set forth in the Petition for Writ of Certiorari as well as petitioners' description of the Opinions in the Courts Below, Jurisdiction of this Court, Statutory Provisions Involved, and the Questions Presented for Review.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT AND CONFUSION AMONG THE CIRCUITS REGARDING A SUBSTANTIAL QUESTION UNDER THE ADEA: WHETHER AN ADEA PLAINTIFF CAN PREVAIL ON THE BASIS OF A BARE-BONES PRIMA FACIE CASE COMBINED WITH SOME EVIDENCE ATTACKING THE EMPLOYER'S ARTICULATED BUSINESS REASON.

This Court has issued only seven rulings on any aspect of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 623-634 (1982).[1] It has never inter-

[1] *Hoffman-La Roche Inc. v. Sperling*, 58 U.S.L.W. 4072 (U.S. Dec. 11, 1989); *Public Employees Retirement Sys. of Ohio v. Betts*, 109 S. Ct. 2854 (1989); *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353 (1985); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *Lorillard v. Pons*, 434 U.S. 575 (1978); *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977).

preted the shifting evidentiary burdens of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), in the context of the ADEA. This case presents the perfect opportunity to do so while at the same time resolving a question that has left the circuits in conflict: if an employer favors a person under 40 over an ADEA plaintiff who is 40 or older, will merely questioning the business judgment of the employer always support a finding of intentional discrimination in violation of the ADEA?

In a decision at odds with the law of other circuit courts of appeals and this Court's case authority, the court below, by a 2-1 majority with Judge Greenberg dissenting, upheld a jury verdict based on the bare statistic of the ages of comparable employees (46 and 36) competing for the same position and on evidence unrelated to the ages of the candidates which the court below believed was sufficient to question Saunders' nondiscriminatory explanation for selecting a younger applicant to fill the position instead of respondent. *Bruno v. W.B. Saunders Co.,* 882 F.2d 760, 766 (3d Cir. 1989). The court below held that where the employer's legitimate, nondiscriminatory reason for hiring a person under 40 instead of a person who is 40 or older may not be "the true reason . . . , the court may infer that the actual reason was impermissible." *Id.*

The decision of the court below is in conflict with other federal circuits and exceeds any reasonable interpretation of the ADEA by misapplying this Court's decisions in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983). Taken to its logical conclusion, the court's analysis sanctions the judicial second-guessing of an employer's subjective business judgment and permits a jury to find intentional age discrimination solely on the basis that the employer's judgment may be mistaken and not, as required by this Court's authority in employment discrimination cases, including *Aikens*, that age was a determining factor in the employment decision. If left standing, the Third Circuit's decision is a dangerous precedent for employers since it transforms the ADEA into a vehicle which attacks the employ-

er's business judgment rather than focusing the inquiry on whether age discrimination affected the employer's judgment.

A. The Decision Below Conflicts With Decisions Of Other Circuit Courts Of Appeals.

The circuit courts of appeals have reached directly conflicting answers to the question of whether an ADEA plaintiff can prevail on the basis of a bare-bones prima facie case combined with some evidence attacking the employer's business judgment. The First, Fifth, and Ninth Circuits reject the Third Circuit's adaptation of *McDonnell Douglas* to ADEA cases, while the Seventh, Eighth, Eleventh, and D.C. Circuits agree with the Third Circuit's reasoning.

The First Circuit, in *Menard v. First Sec. Serv. Corp.*, 848 F.2d 281 (1st Cir. 1988), concluded that even if the plaintiff had demonstrated a prima facie case, the evidence offered by him merely disputed the correctness of the employer's business judgment and therefore did not show the reason for his discharge to be a pretext for age discrimination. *Id.* at 287. The court commented that once the employer satisfied its burden of producing a nondiscriminatory explanation, the effects of the prima facie case are dispelled and the "plaintiff has the burden of proving by a preponderance of the evidence that the defendant's articulated reason was pretextual, and *the real reason for discharge was age discrimination.*" *Id.* (emphasis added); *see also Dea v. Look*, 810 F.2d 12, 15 (1st Cir. 1987) ("[plaintiff] cannot meet his burden of proving 'pretext' simply by refuting or questioning the defendant's articulated reason"). Similarly, the Fifth Circuit, in *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503 (5th Cir. 1988), expressly rejected the Third Circuit's adaptation of *McDonnell Douglas* to ADEA cases and criticized the approach since it allowed plaintiff to prevail without offering any evidence that age motivated the employer's decision. *Id.* at 1508 & n.6.

The view expressed by the Ninth Circuit in *Douglas v. Anderson*, 656 F.2d 528 (9th Cir. 1981), is also at odds with that of the Third Circuit. In that case, the employer showed that the plaintiff was terminated because of the plaintiff's

financial mismanagement of the employer's bookstore. The plaintiff argued that the real reason for his discharge was his criticism of certain financial transactions conducted by the employer which the plaintiff discovered. The court concluded that this evidence does not show that the employer's proffered reason is a pretext for discrimination, "but merely presents an alternative reason not based on age." *Id.* at 534. As the Ninth Circuit explained, "[t]he reason for a business decision need not meet the unqualified approval of the judge or jury, so long as it is not based on age." *Id.*

The Seventh, Eighth, Eleventh, and D.C. Circuits agree with the Third Circuit, however, and equate the discrediting of the employer's business judgment with the ultimate issue that age was a determining factor. The Seventh Circuit, in *La Montagne v. American Convenience Prods., Inc.*, 750 F.2d 1405 (7th Cir. 1984), has declared that while age must be a determining factor, plaintiff could prevail using the *McDonnell Douglas* framework "without presenting *any* evidence that age was a determining factor in the employer's motivation." *Id.* at 1409-10. The court concluded that the indirect method of proof permits a finding of age discrimination based on the elimination of all nondiscriminatory motivations as the reason for the employment decision. *Id.* at 1410. The Eighth Circuit, in *Brooks v. Woodline Motor Freight, Inc.*, 652 F.2d 1061 (8th Cir. 1988), upheld a jury verdict against an employer because the plaintiff established a prima facie case and offered evidence discrediting his employer's explanation. *Id.* at 1064. Similarly, the Eleventh Circuit, in *Stanfield v. Answering Serv., Inc.*, 867 F.2d 1290 (11th Cir. 1989), upheld a jury verdict based on a prima facie case and the *lack of evidence supporting* the employer's legitimate business reason. *Id.* at 1294.

The D.C. Circuit has also argued that an ADEA plaintiff, in certain cases, can prevail solely on the strength of his or her prima facie case coupled with a rebuttal of the employer's explanation. *Krodel v. Young*, 748 F.2d 701, 707-08 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985). However, the court acknowledged that it was not squarely presented with the issue, since the plaintiff offered additional evidence by

which discrimination could be inferred, including a finding that an administrator expressed a preference for younger workers. *Id.*

The circuits also directly disagree as to whether an ADEA plaintiff can avoid summary judgment by asserting that, at trial, he will demonstrate that the employer's stated explanation for its conduct was untrue. The Third Circuit takes the position that an employer's summary judgment motion is to be denied if the plaintiff presents evidence sufficient to show that the employer's proffered explanation may be untrue. It assumes that such a showing resuscitates the prima facie case's presumption of discrimination. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 898 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987). The Ninth Circuit, however, requires that a plaintiff's proof of pretext demonstrates that his age and not the reason offered by the employer motivated the challenged decision. The Ninth Circuit assumes that the prima facie case cannot be revived once the employer rebuts it. *Steckl v. Motorola, Inc.*, 703 F.2d 392, 392-93 (9th Cir. 1983); *see also Menzel v. Western Auto Supply*, 848 F.2d 327, 330 (1st Cir. 1988) (merely casting doubt on the employer's articulated reasons for discharge is insufficient to overcome summary judgment); *Goldberg v. B. Green & Co.*, 836 F.2d 845, 849 (4th Cir. 1988) ("[plaintiff] cannot avoid summary judgment in this case simply by refuting [the employer's] non-age-related reasons for firing him").

In short, the circuit courts have reached directly conflicting answers to the question of whether an ADEA plaintiff can prevail merely by questioning the business judgment of the employer when the employer favors a person under 40 over the plaintiff who is 40 or older. This Court should take this opportunity to resolve the confusion in the circuits by granting certiorari.

B. The Decision Below Conflicts With Decisions Of This Court.

The decision of the court below also misapplies this Court's decisions in *McDonnell Douglas*, *Burdine* and *Aikens*. The court below permits the trial of the employer's business

judgment rather than adhering to the central inquiry in an employment discrimination case: whether the employer's decision was motivated by age.

As this Court has repeatedly cautioned, the shifting burdens of the *McDonnell Douglas-Burdine* formulation are designed to aid the courts and the litigants in the orderly consideration of relevant evidence. *Burdine*, 450 U.S. at 255 n.8. In *Aikens*, this Court warned that district courts should not lose sight of the ultimate issue in a discrimination case: whether the plaintiff sustained his burden of proving that the employer intentionally discriminated against him. 460 U.S. at 715; *see also Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2784 (1988). Thus, while *Burdine* and *Aikens* make clear that a plaintiff can rely upon indirect evidence that the employer's reason is "unworthy of credence", such indirect evidence must be sufficiently probative of the ultimate issue in the case: that discriminatory conduct is a *determining factor* in an employer's business decision. 460 U.S. at 715; 450 U.S. at 253.

In the court below, respondent sought to prove the ultimate issue of the case merely by attacking the observations and explanations of petitioner Saunders' decisionmaker who had selected another candidate for the Manager's position of the Clinics Fulfillment Department, and not, as compelled by *Aikens*, by showing that there was a causal connection between respondent's age and the alleged discriminatory act. Respondent demonstrated only that (i) she was one of nine Saunders' employees applying for the job, (ii) she was 46 years old while the ages of the other applicants were 24, 25, 26, 36, 40, 41, 48, and 49, (iii) Saunders selected Beverly Dietrich (age 36) for the position, (iv) the Saunders' decisionmaker may have been mistaken when he perceived respondent's attitude for the new job to be half-hearted, and (v) Dietrich, who served as acting Manager temporarily prior to the selection, was criticized by two fellow employees for her performance. By simply attacking the decisionmaker's subjective assessment and explanations, respondent failed to forge the critical link between her not being chosen for the

Manager's position of the Clinics Fulfillment Department and her age.

By sanctioning this interpretation of *McDonnell Douglas* in ADEA cases, the court below contradicts this Court's admonition in *Aikens* always to be mindful that the central question is whether plaintiff has presented sufficient evidence to permit a reasonable fact-finder to conclude that age was a determining factor in the employer's decision. *See Aikens*, 460 U.S. at 715. In contrast, other circuits have allowed a jury to infer that the employer's articulated reasons were a pretext for age discrimination and, therefore, that age was a determining factor in a business decision from indirect evidence that management personnel made repeated negative comments directly related to age, *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529-30 (11th Cir. 1987), or that reliable and probative statistics demonstrated a pattern of adverse treatment of older workers, *Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1342 (1st Cir. 1988). The court below failed to rely on any additional evidence demonstrating a causal connection between the employment decision and respondent's age.

Thus, the court below ignored this Court's words of caution by permitting a jury to second-guess the employer's explanation without a showing by an employee that the employer's explanation was a pretext for age discrimination.

C. The Decision Below Presents Important Issues Of Federal Law.

Last term, this Court granted *certiorari* to the Third Circuit in *Harbison-Walker Refractories v. Brieck*, 822 F.2d 52 (3d Cir. 1986), *cert. granted*, 485 U.S. 958, *cert. dismissed as improvidently granted*, 109 S. Ct. 546 (1988) (White, J., dissenting), to explore the applicability of *McDonnell Douglas* to cases under the ADEA, and specifically to explore the nature and significance of the first stage (the prima facie case) and the third stage (pretext) of that proof scheme. The Court considered the following question: "Whether a plaintiff who alleges intentional discrimination can survive summary judgment by questioning his employer's business judgment,

without presenting any evidence, direct or indirect, that his employer's judgment was in fact motivated by an intent to discriminate?" Brief for Petitioner Harbison-Walker at (i). This Court dismissed the petition as improvidently granted after oral argument without making a ruling. 109 S. Ct. 546. Consequently, the debate has continued without any definitive ruling.

This case raises the identical issue that this Court wished to consider in *Harbison-Walker*. Moreover, unlike *Harbison-Walker*, this case comes to the Court with a complete factual record following a jury trial. Therefore, by granting the Petition, this Court will have an opportunity to address on a complete record the question of how, if at all, *McDonnell Douglas* should be applied to the ADEA, a question of vital importance as to which the circuits continue to be in hopeless conflict and confusion.

The question is also of critical importance to the administration of the ADEA and its impact on employers. Reduced to its core, the decision of the court below permits an ADEA plaintiff to prevail at trial without producing any direct or indirect evidence linking a challenged employment decision to age discrimination. The court below applied a standard that reads age out of the well-established analytical framework for discrimination cases by allowing an ADEA plaintiff to prevail upon showing that the employer's explanation may have been mistaken or untrue.[2] For respondent to prove that Saunders' explanation is a pretext for *age discrimination* is one thing. To show that Saunders' decisionmaker is mistaken or his reasoning faulty is something entirely different. It does not follow that the real reason for an employee's non-selection for a position is age discrimination simply because the jury disagrees with and therefore discredits the employer's articulated reason. The employer's decisionmaker may have made a mistake in selecting the right person to fill a position; the

[2] In effect, the decision of the court below requires that an employer prove the absence of a discriminatory motive. This Court has rejected any such interpretation of the *McDonnell Douglas* analytical framework. *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978).

decisionmaker's assessment may have been incorrect because the information provided to him was incomplete; or the employer may have had another nondiscriminatory explanation that it did not wish to tell the employee. This is a far cry from proof of a pretext for age discrimination.

The decision of the court below is especially problematic in ADEA cases since age, unlike race, sex, and national origin, is not an immutable characteristic. Given the natural progression of age, a discharged or non-selected employee will more often than not be replaced by a younger employee. *See Laugesen v. Anaconda Co.*, 510 F.2d 307, 312-13 n.4 (6th Cir. 1975). Therefore, in an ADEA action, a prima facie case will be rather simple to demonstrate under the Third Circuit's analysis, assuming a plaintiff is otherwise qualified to hold a position.[3] The decision of the court below then permits an ADEA plaintiff to prevail based on this simple, bare-bones prima facie case and evidence that the employer may have been mistaken in its business judgment. This cannot be a reasonable interpretation of the ADEA. Indeed, Congress never intended the ADEA to promote truthful explanations or perfect business decisions. The ADEA only requires the intervention of the courts where age is a determining factor in an employment decision.

Therefore, this substantial question of federal law under the ADEA must be resolved by this Court.

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[3] Furthermore, given that age is mutable, the mere selection of a younger employee is not sufficient evidence that age played a role in the employment decision. *See, e.g., Maxfield v. Sinclair Int'l*, 766 F.2d 788 (3d Cir. 1985) (replacement by someone younger does not by itself give rise to an inference of age discrimination). The ADEA does not lend itself to such a brightline rule and in this respect differs from a race or sex discrimination case in which replacement by an employee outside the protected category may very well be a convenient proof guideline. Consequently, the nature and significance of a prima facie case under the ADEA remains unsettled.

II.

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT AND CONFUSION AMONG THE CIRCUITS REGARDING THE USE OF STATISTICAL EVIDENCE IN AN ADEA DISPARATE TREATMENT CASE.

The court below upheld the trial court's decision to admit into evidence respondent's plainly irrelevant statistical analyses of various employment decisions. 882 F.2d at 766-67. Specifically, the trial court allowed the jury to consider respondent's anecdotal statistical comparisons of the ages of (i) Saunders' new hires and all its salaried employees, (ii) Saunders' new hires and all its employees, (iii) Saunders' terminated employees and all its employees, (iv) Saunders' transferred employees and its terminated employees, (v) Saunders' promoted employees and all its employees, and (vi) Saunders' laid-off employees and its retained employees. These raw statistical comparisons indisputably failed to take into account the minimum objective qualifications for the positions studied. *Id.* at 767. Indeed, the majority opinion of the court concedes that the respondent's studies "are significantly less probative than they would be if they took account of the minimum qualifications of the jobs into which promotion or transfer occurred." *Id.* Despite this glaring defect, the court below concluded that respondent's statistics were " 'relevant' ", even though such comparisons would be given no weight in a class action disparate impact or treatment case. *Id.* Following on the heals of this Court's decision in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), the decision of the court below conflicts with other circuit courts of appeals and is particularly troubling since it allows a jury in an ADEA case, rather than a judge, to consider and evaluate the relevance of meaningless statistical comparisons.

A. The Decision Below Conflicts With Decisions Of Other Circuit Courts Of Appeals.

The Sixth and Seventh Circuits specifically disagree with the Third Circuit's holding that the statistical studies in question should be admitted into evidence in ADEA disparate

treatment cases. In *Simpson v. Midland-Ross Corp.*, 823 F.2d 937 (6th Cir. 1987), plaintiff offered similar statistical studies. The court observed that not only had plaintiff failed to provide the "relative qualifications of those hired and the positions to which they were assigned," but also "neglect[ed] vital information regarding the pool of applicants and whether, for example, qualified older employees were available or applied for those jobs." *Id.* at 943. The court commented:

> Unless the statistics, standing alone or in comparison, are sufficient to lead the mind naturally to the conclusion sought, they have no probative value; they do not move the proof one way or another. . . . . . The facts cited by [the plaintiff] do not tell us anything about age other than that some people were of various ages, facts that in themselves are meaningless. . . . Statistics such as those offered may be interesting perhaps, but are fundamentally irrelevant to an age discrimination claim.

Id. at 944.

Similarly, the Seventh Circuit, in *Smith v. General Scanning, Inc.*, 876 F.2d 1315 (7th Cir. 1989), held that plaintiff failed to produce sufficient evidence—including sufficient statistical studies—to suggest that defendant's proffered reasons were a pretext for age discrimination in order to survive summary judgment. *Id.* at 1331-32. Plaintiff offered evidence tending to show that defendant hired 106 new employees (only 9 of whom were over 40). The court concluded that plaintiff's bare statistical showing was meaningless. "[I]n the absence of evidence regarding the qualified potential applicants from the relevant labor market, we find [plaintiff's] statistics fail in any way to show discrimination." *Id.* at 1321.

Contrary to the decisions of the Sixth and Seventh Circuits, the D.C. Circuit Court of Appeals has agreed with the Third Circuit that statistical studies in individual disparate treatment cases do not have to measure up to the standards for admissibility of statistics in class action disparate impact or treatment cases. *See Krodel v. Young*, 748

F.2d 701 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985). The D.C. Circuit noted that although the statistical comparisons in an ADEA failure to promote case were " 'broad and tentative,' . . . 'the simple percentage comparisons are not so simplistic as to lack meaning.' " *Id.* at 710 (quoting *Krodel v. Young*, Civ. No. 80-3183, slip op. at 39 n.3 (Feb. 9, 1983)). The court concluded that "a trial judge should be allowed to consider a disparate treatment plaintiff's statistics and to judge for herself their meaningfulness to the question of discriminatory intent." 748 F.2d at 710.[4]

This Court has never directly addressed the precision with which an individual disparate treatment plaintiff must present statistical evidence in an ADEA case. This case presents the opportunity to resolve confusion in the circuit courts and provide the courts with much needed guidance on the use of statistical evidence in the increasing numbers of ADEA cases.

B. The Decision Below Conflicts With Decisions Of This Court.

As this Court has recognized, statistical evidence plays an important role in employment discrimination litigation. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). While endorsing the use of statistical proof and noting that statistical analyses will continue to serve an important role in uncovering clandestine and covert discrimination, *id.*, this Court has cautioned that

> [s]tatistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they

[4] Other federal courts have also admitted seemingly questionable statistical evidence in Title VII and ADEA cases. *See Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1104 (8th Cir. 1988) (while the parties disputed the significance of the labor market and hiring data, the court observed that "[t]he jury should have been allowed to consider [plaintiff's] workforce evidence and sort out the parties' conflicting explanations of its significance"); *Beck v. Quiktrip Corp.*, 708 F.2d 532, 535 (10th Cir. 1983) ("statistical evidence which alone might be insufficient to establish a prima facie case of discrimination or to discredit an employer's proffered reason for its action is not necessarily irrelevant") (citing *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 954-55 (10th Cir. 1980)).

> may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.

Id. at 340.

Thus, this Court's decisions have stressed the cautious approach lower federal courts should take to statistical analyses as proof of discrimination. In *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974), this Court described as "meaningless" racial composition comparisons of a selection process for school board members which incorrectly assumed that "all citizens are fungible" for purposes of determining the pool of candidates for the positions at issue. *Id.* at 620-21. The Court noted that statistics which fail to control for special qualifications for the positions studied are "too fragmentary and speculative to support a serious charge [of discrimination] in a judicial proceeding." *Id.* at 621.

In *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), the Court noted that " 'the proper comparison' " in statistical analyses of employment discrimination " '[is] between the racial composition of the *qualified . . . population in the relevant labor market.*' " *Id.* at 2121 (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 (1977)) (emphasis added). Because plaintiff's statistics failed to account for the minimum objective qualifications for the at-issue jobs, this Court concluded that the studies were "nonsensical." 109 S. Ct. at 2122.

Also in 1989, this Court, in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), cautioned:

> In the employment context, we have recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer's workforce to the racial composition of the relevant population may be probative of a pattern of discrimination. . . . But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion *must* be the number of minorities qualified to undertake the particular task.

Id. at 725 (citations omitted).

Use of statistics in both Title VII and ADEA cases requires, at the outset, a determination of who should be included in the relevant population studied. If an employment opportunity requires special skills, education, or experience, the relevant population must be restricted to include only those members of the community who possess these qualifications. *See Hazelwood*, 433 U.S. at 308 n.13. If the issue concerns promotions, the relevant population is internal to the employer's work force and consists of all persons with the necessary qualifications to perform the at-issue job. *See McIntosh v. Weinberger*, 810 F.2d 1411, 1428 (8th Cir. 1987), *vacated on other grounds*, 108 S. Ct. 2861 (1988).

The court below did not approach statistical evidence in an ADEA disparate treatment case with the same cautionary approach demanded by this Court's decisions. The court below expressly rejected the rule that statistical evidence account for minimum objective qualifications, saying such a rule would not be "broadly useful." 882 F.2d at 767. The Third Circuit accepted without question the statistical analyses of respondent's expert witness and noted that in individual disparate treatment cases, statistical evidence need not be so finely tuned. *Id.* While acknowledging that the studies were "significantly less probative" than they would have been had they taken into account the minimum objective qualifications of the at-issue jobs, the court concluded that such flawed statistical studies were nevertheless " 'relevant.' " *Id.*[5]

The decision of the court below is troubling because it involved a disparate treatment case where the role of statistics should necessarily be a limited one, as the ultimate issue in such cases is whether the particular ADEA plaintiff, and not an entire class, was the victim of an illegally motivated

[5] While this Court has observed that the failure to include certain variables in a multiple regression analysis may affect its probativeness, not its admissibility, *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), it has also noted "[t]here may, of course, be some regressions so incomplete as to be inadmissible as irrelevant . . ." *Id.* at 400 n.10. The respondent's incomplete statistical studies must also be so categorized.

decision.[6] Furthermore, courts must be even more critical of statistical analyses in ADEA cases than in Title VII cases because of the identity of the factfinder. In Title VII cases, the judge, who is also the factfinder, can simply reject meaningless statistical studies as not being probative of the issue in the case. *See, e.g., Frazier v. Consolidated Rail Corp.*, 851 F.2d 1447, 1454 (D.C. Cir. 1988) (plaintiffs' statistical evidence did not permit a "meaningful comparison in support of the plaintiffs' prima facie case"). In an ADEA case, by contrast, the jury is given the critical task of deciding the dispositive issue of whether age is a determining factor in an employer's decision. It should not also have the complicated function of a trial judge of evaluating the relevance of otherwise meaningless statistical studies. The court below asked the jury to make both factual findings and legal determinations of relevance by determining whether respondent's statistical studies were devoid of probative value. As the dissenting judge noted in the court below, "the district court wrongfully relinquished its function as the judge of the law, which includes the obligation to pass on the admissibility of [statistical] evidence, to the jury." 882 F.2d at 775.

In short, the Third Circuit has not only issued a "circuit splitting" decision, but its sanctioning of meaningless statistical evidence seriously ignores this Court's authority. This Court should therefore grant the Petition to clarify the Third Circuit's misconception that an ADEA individual disparate treatment case should be treated differently from a class action disparate impact or treatment case.

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[6] In Title VII disparate treatment cases, the federal courts have followed such a cautionary approach to statistical evidence. *See, e.g., Lamphere v. Brown Univ.*, 685 F.2d 743, 759-50 (1st Cir. 1982) (per curiam) (in a sex discrimination case, numerical disparity of men and women in a particular job category was not probative since plaintiff's studies failed to provide statistics as to the number of qualified women in the relevant labor pool).

III.

THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT BELOW CIRCUMVENTED THIS COURT'S DECISION IN *FORD MOTOR CO. V. EEOC* WHEN IT HELD THAT A WRITTEN UNCONDITIONAL OFFER OF A SUPERIOR OR A SUBSTANTIALLY EQUIVALENT JOB DID NOT TOLL THE ACCRUAL OF BACK PAY LIABILITY.

In *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982), this Court declared that the preferred means of encouraging the end of employment discrimination in the workplace is through " 'voluntary compliance.' " *Id.* at 228 (citation omitted). To accomplish the objective of bringing an end to employment discrimination, this Court adopted rules to encourage employers "promptly to make curative, unconditional job offers to . . . claimants, thereby bringing defendants into 'voluntary compliance' and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace." *Id.* The Court held therefore that "absent special circumstances," an employee forfeits the right to back pay if he rejects an unconditional job offer of substantially equivalent employment. *Id.* at 241.

Several months after the selection of Ms. Dietrich for the Manager's position, respondent was offered the position of Manager of Inventory Planning and Control at Saunders' Bellmawr, New Jersey facility. 882 F.2d at 763. Respondent testified that in a conversation with her immediate superior she had been told that it was expected she would drop her EEOC claim. *Id.* at 770. After rejecting the job, respondent received a written memorandum, at a time when she still could have taken the job, saying "[t]he Bellmawr job offer is not, and never was, conditional on dropping your claim." *Id.* Although the written offer expressly repudiated any notion that respondent's acceptance of the job was conditioned upon the dismissal of her claim, respondent decided not to accept the unconditional offer of a substantially similar position. *Id.*

The court below held that respondent's subjective fear of retaliation, supported only by an earlier seemingly condi-

tional offer of the same job, is sufficient to justify her rejection of the unconditional offer. *Id.* at 770-71. The court below dismissed the evidence of the written memorandum saying that the written confirming memorandum "merely present[ed] a question of credibility." *Id.* at 770. In reaching this conclusion, the court below misapplied *Ford Motor* and created a new standard never before adopted by this Court or any of the other circuit courts of appeals which have applied *Ford Motor.*

This Court and lower federal courts have held that a plaintiff might reject an unconditional job offer in "exceptional circumstances." In *Ford Motor,* this Court gave the example of a plaintiff having to relocate a great distance as an "exceptional circumstance" meriting rejection of an unconditional job offer. *Id.* at 238 n.27. Other federal courts have viewed the "exceptional circumstances" standard narrowly and have generally applied it to situations where a plaintiff is placed in a position of evaluating the transactional costs against the benefit of the offer. *See, e.g., Orzel v. City of Wauwatosa Fire Dep't,* 697 F.2d 743, 757 (7th Cir.), *cert. denied,* 464 U.S. 922 (1983) (claimant's refusal of offer conditioned on taking and passing a physical examination arranged by employer did not toll back pay period).

Before the decision of the court below, no court, to the Association's knowledge, has permitted a plaintiff to reject an unconditional offer of a substantially equivalent job on the sole basis of having received a prior conditional offer requesting the plaintiff drop her claim. Indeed, such a result cannot be squared with this Court's admonition that employers take prompt corrective action and that victims of discrimination minimize their damages by accepting an unconditional job offer of a substantially equivalent job.

Indeed, assuming any condition is initially imposed on the job offer, employers must be allowed to remove such a condition if the principles of *Ford Motor* are to be given any effect. Surely, if the original job offer is vague, indefinite, or somehow qualified, an employer must be allowed to take corrective action to make the job offer definitive and uncondi-

tional. The same reasoning must hold true where the offer is at first conditioned on the respondent dropping her claim.

When faced with an ADEA or Title VII action, or a threat of such litigation, employers may first try to resolve the dispute by making a job offer which is conditioned upon the settlement of the dispute. If such an attempt is initially unsuccessful, an employer should not be denied the opportunity to take corrective action under *Ford Motor* by making an unconditional job offer. However, under the Third Circuit's reasoning, an employer may very well be jeopardizing its right to take corrective action under *Ford Motor* if it first proceeds to try to settle the dispute. This Court never intended such a result when it announced its decision in *Ford Motor.*

Moreover, the policy underlying *Ford Motor* must be against permitting the rejection of a substantially equivalent job based only upon a subjective fear of retaliation. Indeed, numerous cases make it clear that "exceptional circumstances" are not present because of hurt feelings, suspicions that the job offer was not bona fide, or a desire not to work for the supervisor who discharged the employee. *E.g., Giandonato v. Sybron Corp.*, 804 F.2d 120, 124 (10th Cir. 1986) (plaintiff "did not comply with *Ford Motor Co.'s* mandate of minimizing his damages by refusing his employer's offer of reinstatement [because of his] desire not to work under [his former supervisor]"); *Cowen v. Standard Brands, Inc.*, 572 F. Supp. 1576, 1581 (N.D. Ala. 1983) (plaintiff cannot turn down job because "feelings were hurt and . . . he did not feel the offer was bona fide").

If, as *Ford Motor* holds, an employer can toll back pay liability by unconditionally offering a substantially equivalent job, that employer must, as a matter of law, be permitted to repudiate in writing an alleged condition attached to an earlier offer. Such a result would promote corrective action by employers, the goals of the ADEA, and the goals of *Ford Motor.*

CONCLUSION

For the foregoing reasons, the Association respectfully submits that the decision below conflicts with the decisions of other circuit courts and this Court's authority, that this case presents substantial federal questions for this Court's review, and that, accordingly, this Court should grant the Petition for Writ of Certiorari.

DATED: December 28, 1989

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

STATE OF VIRGINIA
COUNTY OF ARLINGTON } ss.:

I am a citizen of the United States and a resident of the City of Arlington, Virginia, County of Arlington; I am over the age of 18 years and not a party to the within action; my business address is 1101 Wilson Boulevard, Arlington, Virginia 22209.

On December 28, 1989, I served the within Motion for Leave to File Brief and Brief of Amicus Curiae in re: "W.B. Saunders Company and CBS Educational and Professional Publishing, a Division of CBS Inc. v. Adeline M. Bruno" in the United States Supreme Court, October Term 1989, No. 89-857, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Arlington, Virginia addressed as follows:

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All parties required to be served have been served.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on December 28, 1989, at Arlington, Virginia.

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